Sent to Parties 1/2/19

SCANNED

STATE OF NEW YORK
CITY COURT: CITY OF CORNING

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

DECISION & ORDER
Case No. CR-01563-18

CHRISTIE L. SPECIALE,
Defendant.

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Appearances: Steuben County District Attorney Brooks T. Baker, Esq.
Susan Chana Lask, Esq., Attorney for the Defendant, Christie L. Speciale

This matter is before the Court on various motions by the defendant including an Omnibus Motion and motions to recuse the District Attorney, to vacate the Temporary Order of Protection and to compel Discovery. The Court has reviewed the following pleadings:

1. Omnibus Motion and Affirmation of Susan Chana Lask both dated October 16, 2018;
2. Memorandum of Law Supporting Defendant Speciale's Motion to Dismiss All Charges dated October 16, 2018;
3. Affirmation of Brooks T. Baker dated November 18, 2018;
4. Reply Affirmation of Susan Chana Lask, Esq. in Support of Motion To Dismiss & Omnibus Motion dated November 9, 2018;
5. Notice of Motion To Vacate Temporary Order of Protection and Affirmation of Susan Chana Lask, Esq. both dated December 7, 2018;
6. Notice of Motion to Recuse District Attorney Baker and Appoint a Special Prosecutor and Affirmation of Susan Chana Lask both dated November 9, 2018;
7. Affirmation in Opposition of Brooks T. Baker dated October 22, 2018Notice of Motion to Compel Discovery and Affirmation of Susan Chana Lask both dated December 7, 2018;

8. Informations charging the Defendant with Aggravated Harassment in the Second Degree; Disorderly Conduct; and Stalking in the Fourth Degree, all affirmed by Lt. R.W. Swan and dated October 1, 2018;
9. Supporting Deposition of Anthony White dated September 28, 2018;
10. Supporting Deposition of Jonathan E. Stoltzfus dated September 22, 2018;
11. Supporting Deposition of Renata Brenner dated September 26, 2018;
12. Supporting Deposition of Kathleen Randall dated September 27, 2018;
13. City of Corning Police Incident Reports dated September 22, 2018 and September 23, 2018

The Court has also heard from both counsel.

FACTS

The Defendant was charged with the crimes of Aggravated Harassment in the Second Degree, Stalking in the Fourth Degree and two counts of and Disorderly Conduct, all allegedly occurring on September 22, 2018. The defendant was arraigned in Corning City Court on October 2, 2018, and the above referenced motions were subsequently filed with the Court.

OMNIBUS MOTION

*Discovery*

The Court finds that the defendant's Omnibus Motion constitutes a filing of the defendant's Demand for a Bill of Particulars pursuant to CPL 200.95(3) and a Demand for Discovery pursuant to CPL 240.20(1). Therefore, the People are directed to file responses to both within thirty days from the date of this Order. To the extent that the defendant's request for Discovery is beyond the scope of CPL 240.20(1), the demand is hereby denied.

*Dismissal as Jurisdictionally Insufficient*

CPL §100.40(1) provides that an information "is sufficient on its face when: ... (b) The allegations of the factual part of the information, together with those of any supporting depositions which may accompany it, provide reasonable cause to believe that the defendant committed the offense charged in the accusatory part of the information; and

(c) Non-hearsay allegations of the factual part of the information and/or of any supporting depositions establish, if true, every element of the offense charged and the defendant's commission thereof." Therefore, there must be "non-hearsay allegations" of fact that "provide reasonable cause to believe that the defendant committed the offense charged".

*Disorderly Conduct*

Penal Law (PL) 240.20 provides as follows: "A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof: (3.) In a public place, he uses abusive or obscene language, or makes an obscene gesture; or (7.) He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose."

The allegations in the Information charging this offense are based upon the supporting depositions of Kathleen Randall, Jonathan E. Stoltzfus, Renata Brenner and Anthony White. The Court finds that the depositions contain sufficient non-hearsay allegations which establish, if true, every element of the offense of Disorderly Conduct and therefore the defendant's motion to dismiss this charge is denied.

*Stalking in the 4th Degree*

"A person is guilty of stalking in the fourth degree when he or she intentionally, and for no legitimate purpose, engages in a course of conduct directed at a specific person, and knows or reasonably should know that such conduct (2) causes material harm to the mental or emotional health of such person, where such conduct consists of following, telephoning or initiating communication or contact with such person, a member of such person's immediate family or a third party with whom such person is acquainted, and the actor was previously clearly informed to cease that conduct (PL) § 120.45(2)).

The Information states that the "factual allegations are based upon the personal knowledge of the complainant (Lt. R.W. Swan), and upon information and belief, the sources of the complainant's information and belief being the Corning Police Department investigation." The Information does not refer to, or apparently rely upon, the four supporting depositions referenced in the Information charging Disorderly Conduct. Lt. Swan did not submit an affidavit or deposition setting forth which facts, if any, were based

upon his personal knowledge. Further, based upon a review of the City of Corning Police Incident Reports, it does not appear that Lt. Swan was a responding officer or present on September 22, 2018, when the defendant's alleged criminal conduct took place.

Even if the Court were to consider the supporting depositions filed with respect to the two counts of Disorderly Conduct nothing contained in those depositions would be likely to instill in the complainant a reasonable fear of harm. (*People v. Wong*, 2004, 3 Misc.3d 274, 776 N.Y.S.2d 194)

Therefore, there is nothing before the Court that establishes that Lt. Swan has "personal knowledge" of the factual part of the information. The Information's reliance on "the Corning Police Department investigation" is clearly impermissible hearsay and therefore insufficient to establish "reasonable cause to believe that the defendant committed the offense charged."

The Court finds that there are insufficient non-hearsay allegations that establish, if true, every element of the crime of Stalking in the 4th Degree and therefore the defendant's motion to dismiss this Information as insufficient on its face is granted.

*Aggravated Harassment in the Second Degree*

A person is guilty of aggravated harassment in the second degree when "[w]ith the intent to harass, annoy, threaten or alarm another person, he or she strikes, shoves, kicks, or otherwise subjects another person to physical contact, or attempts or threatens to do the same because of a belief or perception regarding such person's race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation, regardless of whether the belief or perception is correct" (PL § 240.30(3).

The Information supporting this charge states that the "factual allegations are based upon the personal knowledge of the complainant (Lt. R.W. Swan), and upon information and belief, the sources of the complainant's information and belief being the Corning Police Department investigation."

In accord with the reasoning set forth above, this Court finds that there are insufficient non-hearsay allegations that establish, if true, every element of the crime of Aggravated Harassment in the Second Degree. Even if the factual allegations were based

on the complainant's personal knowledge and the police investigation including the supporting depositions of the victim and the three eyewitnesses, there are no facts alleged to support a finding that the defendant struck, shoved, kicked or otherwise subject another person to physical contact or attempted to do the same and therefore the defendant's motion to dismiss the charge of Aggravated Harassment in the Second Degree is granted.

*Preclusion of Identification*

As the People assert that there was no out of court identification procedure, the defendant's motion to preclude evidence regarding any out of court identification procedure is granted.

*Probable Cause Dismissal or Hearing*

The defendant's application for dismissal or a hearing based on the lack of probable cause for the defendant's arrest is denied as she has failed to allege facts sufficient to grant her request (*People v. Mendoza* 82 NY2d 415 [1993]).

*Suppression of Statements*

As the People have not served a timely CPL 710.30 Notice, any statements required to be noticed pursuant to CPL 710.30 are hereby suppressed.

*Sandoval*

The defendant's motion for a *Sandoval* Hearing is granted.

*Additional Motions*

The defendant's application to supplement these motions or file additional motions is denied absence good cause shown.

MOTON TO VACATE THE ORDER OF PROTECTION

The defendant has moved to vacate the temporary order of protection (TOP) issued at the request of the District Attorney's Office by this Court at the conclusion of a court appearance regarding motion proceedings. The defendant's attorney claims that she was "completely ambushed" by the DA's request and that the TOP should be vacated because the DA failed to provide the defendant due process in the form of a hearing which, she claims, must be held before a court can issue a TOP.

The District Attorney's Office did not file a response to the defendant's motion to vacate the TOP.

The purpose of a TOP is to protect the complaining witness and is of "predominance importance" (*Weiner v. State*, 27 Misc3d 1203 [Sup Crt Suffolk County 2010]). As noted in *People v. Bongiovanni*, (183 Misc2d 104, 105-6 [Sup Ct, Kings County 1999]), "[u]ntil there is a determination of guilt or innocence the court is responsible not only to seek justice by safeguarding the rights of the defendant; it must also insure that the complainant is secure and that societal peace is preserved during the pendency of the action."

Criminal Procedure Law (CPL) § 530.13 provides that in any pending criminal action, the Court may issue *ex parte* a temporary order of protection on behalf of the victims or designated witnesses to the alleged offense upon the filing of a facially sufficient accusatory instrument and for good cause shown. (CPL § 530.13(1,2)).

Although defendant's attorney claims that she "ambushed" by the DA's request for a TOP, she appeared to be referring to a letter the DA "waived in front of Judge McCarthy" concerning a possible civil suit based on the facts related to the criminal action. This letter was eventually provided defendant's attorney and did not form any part, nor was considered, in this Court's decision to issue a TOP.

The defendant's assertion that she is entitled to a full evidentiary hearing before a TOP can be issued is unsupported by law or due process considerations. There is no constitutional or statutory right to confront an accuser prior to trial, particularly in light of the state's strong interest in protecting victims (*Weiner v. State,* Id.). All that is required is that the judge ascertain whether or not a TOP should be issued, or continued, based on facts contained in the record. The Court's guiding query should be: is there a continuing danger of injury or intimidation to the complainant? (Weiner v. State, Id.). While an evidentiary hearing may be appropriate, the need for such a hearing and the form thereof, is best left to the discretion of the arraignment judge . . . (and as) long as a meaningful opportunity to be heard is afforded, due process is satisfied (*Weiner v. State,* Id.).

In this case, based on this Court's review of the three accusatory instruments and four supporting depositions that were filed, there was sufficient "good cause" for the issuance of the TOP. Further, the record discloses that counsel was given an opportunity to argue to the contrary.

Therefore, the defendant's request for an order vacating the order of protection or requesting a hearing, is hereby denied.

MOTION TO COMPEL DISCOVERY

This issue was heretofore addressed above as part of the defendant's Omnibus Motion.

MOTION TO RECUSE THE DISTRICT ATTORNEY

The defendant filed a motion and affirmation of Susan Chana Lask, Esq., both dated November 9, 2018, seeking recusal of the District Attorney and appointment of a Special Prosecutor. The defendant asserts that this prosecution is based on personal animosity, fueled by some of the alleged opinions of the District Attorney's family members, and that the District Attorney violated several Rules of Professional Conduct. By affirmation in opposition submitted by District Attorney Baker, , dated November 18, 2018, it was alleged that the defendant's motion was not timely, that the defendant's affirmation and the attached report included numerous factual inaccuracies and unfounded opinions and requests the imposition of a mutual "gag order" on both parties.

The Court finds that the defendant has demonstrated good cause (CPL § 255.20(3)) for the late filing of this motion and, therefore, this Court will entertain and decide this motion on its merits.

This Court is aware of the credentials and reputation of the author of the report attached to the defendant's motion papers. However, this report was based solely on facts, many of which are disputed by the People, and the perspective, presented by the defendant. Therefore, the Court accords this report limited weight.

Similarly, the affirmation of Susan Chana Lask, Esq. recites facts, opinions and conclusions that are disputed by the People.

The District Attorney is a constitutional office charged by statute with the duty of conducting "all prosecutions for crimes and offenses cognizable by the courts of the county for which he shall have been elected" (County Law, § 700)

It is well established in New York that the district attorney, and the district attorney alone, should decide when and in what manner to prosecute a suspected offender

(*People v. Di Falco*, 44 N.Y.2d 482, 486-487 [1978]; *Johnson v. Town of Colonie*, 102 A.D.2d 925, 926 [3rd Dept. [1984]; *Zimmerman v. City of New York,* 52 Misc. 2d 797, 801 [Sup Ct., New York County 1966]; In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion (*Bordenkircher v. Hayes*, 434 U.S. 357 [1978]).

As a general rule, a public prosecutor should be removed only to protect a defendant from actual prejudice arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence(*Schumer v. Holtzman*, 60 N.Y.2d 46, 55 [1983]). For example, recusal was appropriate where the District Attorney who presented the case to the Grand Jury, was also counsel to and a stockholder in the corporation in which defendant was alleged to have committed "white collar" crimes (*People v Zimmer*, 51 NY2d 390 [1980]), or where defendant's former counsel in a criminal proceeding joined the District Attorney's Office while the defendant was prosecuted by that office for this crime. *People v Shinkle*, 51 NY2d 417 [1980]).

However, the standard for recusal is high. As a general rule, courts should "remove a public prosecutor only to protect a defendant from actual prejudice arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence ( *People v Zimmer*, Id.; *People v Shinkle*, Id.) and the appearance of impropriety, standing alone, might not be grounds for disqualification" (Matter of Schumer v. Holtzman, 60 NY2d 46 55 [1983]). The objector should demonstrate actual prejudice or so substantial a risk thereof as could not be ignored (*Matter of Schumer v. Holtzman*, Id.)

This Court finds that, even accepting the allegations in the affirmation of Susan Chana Lask, Esq., to be true, the defendant has not met this high bar and has not demonstrated "actual prejudice or so substantial a risk thereof as could not be ignored" (*Matter of Schumer v. Holtzman*, Id.). .

This Court makes no findings with respect to the defendant's allegations that the District Attorney violated several Rules of Professional Conduct by his conduct in this

matter. If such violations have occurred, this Court does not believe the proper remedy is the recusal of the District Attorney from this case.

This constitutes the Decision and Order of this Court.

*The People's request for a "gag order"*

If there is a serious threat to a defendant's right to a fair trial, the Court may prohibit both attorneys from public communications (*Fischetti v. Scherer* 44 AD3d 89 [1st Dept. 2007]). Counsel are reminded that they are to refrain from any public comments or communications if there is a substantial likelihood that such public comment could materially prejudice this case (Rules of Professional Conduct, Rule 3.6(b)). s "prior restraints of speech are unquestionably viewed with a strong presumption against their validity" (*Fischetti v. Scherer*, Id. , *Carroll v. President & Commrs. of Princess Anne,* 393 U.S. 175 [1968]), the application for a "gag order" is denied.

This constitutes the Decision and Order of this Court.

Dated: 1/2/19

ENTER:

HON. MATHEW K. MCCATHY
Corning City Court Judge

Sent 1/2/19

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